Supreme Court, U.S.
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No. 98-921

In The

Supreme Court of the United States

October Term, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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Dated: January 5, 1999

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ALTERNATE ISSUES PRESENTED

1. SHOULD THIS COURT REVIEW AN INDIVIDUAL'S CLAIMS (i) THAT TEXAS IS NOT COMPLYING WITH FEDERAL LEGISLATION WHICH CREATES NO FEDERAL RIGHTS, AND (ii) THAT A TEXAS COURT MISCONSTRUED TEXAS STATUTES?

2. SHOULD THIS COURT REVIEW A DISCRETIONARY AWARD OF ATTORNEY'S FEES MADE PURSUANT TO A TEXAS STATUTE?

RULE 29.4(a) LISTING

Since petitioner is an employee of the Federal Energy Regulatory Commission, the Solicitor General will be served with a copy of this response.

RULE 29.4(c) LISTING

Based solely on petitioner having served a copy of her petition on the Attorney General for the State of Texas, respondent is also serving a copy of this response on the Attorney General of the State of Texas.

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I.

OBJECTION TO JURISDICTION

Respondent objects to consideration of the questions posed by petitioner because no federal issue was properly presented to or addressed by the Texas state courts. The petition should be denied because this Court lacks jurisdiction to consider the questions presented by petitioner.

Except under very rare exceptions, when the Supreme Court reviews a state court decision under 28 U.S.C. § 1257 it will not consider a federal claim unless it was either addressed by, or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam). When the state court is silent on any federal question, the Supreme Court assumes that the issue was not properly presented to the state court; petitioner bears the burden of defeating that assumption. *Id.*

Petitioner first raised any claimed "federal question" in her amended motion for rehearing before the Texas supreme court, which is not sufficient when the state court is silent on the question. *Id.*, at footnote 3. Respondent's response to that amended motion for rehearing is attached as Respondent's Appendix 1.

Moreover, petitioner did not comply with this Court's Rule 14.1(g)(1). Petitioner failed to identify the stage of the proceedings in the state courts where the federal question was raised, the manner in which she raised it, and the way that the question was passed on by the state courts. Petitioner also failed to identify the portion of the record, or any summary thereof, where the federal matters appear, to show she timely raised any federal question.

II.

OBJECTION TO MISSTATEMENTS OF FACT

The tone of petitioner's brief is set by her appearance before this Court as Cynthia A. Frey (On the Brief) (Counsel of Record). While she may be also known as Cynthia A. Frey, at all times previous in these proceedings she has used the last name Nordstrom (through October 30, 1998; See Respondent's Appendix 2, responding to "Cynthia Frey Nordstrom"). The sudden switching of names in an obvious attempt to disguise the fact that counsel of record is also the petitioner characterizes her maneuvering throughout the appeals process by misstating facts in an attempt to mislead the court.

Petitioner's other misstatements are many and include, for example, her complaint that the trial court and court of appeals ignored a Texas statute in calculating respondent's net resources. Specifically, on page 20 of her petition, petitioner states "The trial court and the *Nordstrom* decision ignored the requirements of the statute to properly make this finding and include the appropriate items of income." That statement is false, because the calculation was directly addressed by the trial court, as quoted in petitioner's brief, and by the court of appeals under *Section C., Waiver,* in its opinion (Pet. App. 16a).

The gravamen of petitioner's complaints is the ability of the trial court, as the trier of fact, to judge the credibility of the witnesses and the weight to be given their testimony. Petitioner is not pleased with the credibility given her testimony by the trial court, but is not candid with this Court in her petition.

III.

OBJECTION TO MISSTATEMENTS OF LAW

Petitioner refers to the court of appeals opinion in *Nordstrom* throughout her petition as legal precedent, leading Texas jurisprudence down a slippery slope, culminating in "destructive consequences for thousands of women and children in Texas" (Petition, page 3). However, even though the Texas supreme court denied the petition for review (see Pet. App. 27a), they may not have been satisfied that the opinion of the court of appeals in all respects declared the law correctly, but may have been of the opinion that the application for writ presented "no error of law that required reversal", or presented no error of law "which is of such importance" to Texas jurisprudence as to require correction. Texas Rules of Appellate Procedure 133. Comparing it to this Court's denial of certiorari, commentators have pointed out that the denial of an application of writ to the Texas Supreme Court imports nothing to the merits of the case. Elaine A. Carlson & Roland Garcia, Jr.: *Discretionary Review Powers of the Texas Supreme Court*, 50 Tex. Bar J. 1201 (Dec. 1987).

IV.

NO FEDERAL ISSUE PRESENTED

No federal issue exists in this case for this Court to review. The constitutionality of the state statutes are not called into question by petitioner. Instead, petitioner argues that the court of appeals misinterpreted and misapplied the Texas Family Code.

Federal regulatory provisions relating to the enforcement of Title IV-D programs to the states, which petitioner cites as the federal issue (or interest), have been determined by this Court to simply set a "yardstick" by which the Secretary of Health and Human Services could measure the state's system-wide performance of the Title IV-D program. *Blessing v. Freestone*, 520 U.S. 329 (1997). The Secretary of Health and Human Services explained this to petitioner, before she filed her brief in this Court (Resp.App. 2) (Unlike the petitioners in *Blessing*, petitioner and her child are not entitled to Title IV-D assistance, and have not made any claims for that assistance).

Petitioner argues that the court of appeals has contravened federal intent of Title IV-D law, so this Court should intervene. However, she knows, or should know, she has no standing, and that this Court recognized in *Blessing* that Congress intended to leave the implementation of IV-D policy to the states, and simply established standards within the legislation for the Secretary of Health and Human Services to impose penalties against states that did not meet the standards which are set regarding compliance with those laws.

Although petitioner invites this Court to find the court of appeals misapplied certain sections of the Texas Family Code dealing with child support for those with income over $6,000 per month, and a discretionary award of attorney's fees, the rule established by this Court almost 40 years ago is clear. The application by a state court of state law to facts upon which it founds its judgment is controlling on this Court. *Scripto, Inc. v. Carson*, 362 U.S. 207, 210 (1960).

Petitioner would have this Court review the entire record below, determine what the facts are, interpret specific sections of the Texas Family Code, and remove the discretion of the trial court. When previously requested to engage in such activity, this Court declined, stating "we are not free to substitute our own interpretations of state statutes for those of a State's courts." *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

V.

FRIVOLOUS PETITION

Petitioner's petition is frivolous. As an officer of the Court she knew, or should have known, she had not properly raised any federal question in the courts below, and that no federal issue was presented by her petition. A clear indication is her failure to comply with Rule 14.1(g)(1) of this Court, since had she done so, the defects in her petition would have been shown.

Also particularly telling is the letter petitioner received from the Department of Health and Human Services (Resp.App. 2), a month before her petition was filed. That letter clearly informs her:

> "The establishment of the guidelines to be used in determining or modifying a child support award amount is substantially a matter of State law. The application of these guidelines is determined by State rather than Federal law." (Resp.App. 2)

Respondent has incurred $3,000 in reasonable and necessary attorney's fees and costs in responding to the petition, which he requests be awarded him and against

petitioner as just damages, pursuant to Rule 42.2 of the Rules of the Supreme Court.

VI.

CONCLUSION

Petitioner failed to properly present what she argues are federal issues to the Texas state courts. She has not followed the Rules of this Court. In essence all her petition argues is that the court of appeals misconstrued or misapplied the Texas Family Code, which raises no federal issue for this Court to consider. Petitioner's slippery slope argument simply seeks to divert this Court's attention from the real credibility issues the trial court and the court of appeals found applicable to the evidence. Trial judges in Texas have the discretion to evaluate the credibility of the evidence; no abuse of that discretion was found by the court of appeals. Trial judges must have that discretion in evaluating the credibility of evidence offered to support claims that a child must have an additional $2,400 per month to pay for living expenses. In the courts below, and in her petition in this Court, petitioner has demonstrated that her credibility, and the credibility of her evidence, was properly scrutinized, and discounted, which does not raise a federal issue. Respondent requests that the Supreme Court deny the petition for

writ of certiorari, and award him just damages against petitioner.

Respectfully submitted,

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RESPONDENT'S APPENDIX I

NO. 98-0252

THE SUPREME COURT OF TEXAS

CYNTHIA F. NORDSTROM,

Petitioner,

vs.

PETER JOHN NORDSTROM,

Respondent.

On Appeal From The First Court of Appeals
Houston, Texas
Cause No. 01-96-00956-CV

RESPONSE IN OPPOSITION TO MOTION TO FILE AMENDED MOTION FOR REHEARING AND TO MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COMES NOW PETER JOHN NORDSTROM, respondent herein, and files this his response in opposition to petitioner's motion to file amended motion for rehearing ("motion"), and her motion for rehearing, and respectfully shows this Honorable Court that Petitioner's motion and motion for rehearing should be denied for the following reasons:

1. Petitioner's motion requests that she be allowed to amend her motion for rehearing pursuant to Rule 53.8 of the Texas Rules of Appellate Procedure. The rule allows the amendment of a petition, response, or reply (not a motion for rehearing), on such reasonable terms as the Court may prescribe.

2. The reason for amendment advanced by petitioner in her motion is that "she has found the federal laws governing the states regarding child support." This is not a proper or legitimate reason for amendment of her motion for rehearing because no issues of federal law were raised by petitioner in this case in the trial court, the court of appeals, or this Court before petitioner filed her motion for rehearing.

The function of a motion for rehearing is to present to the court errors of law which have been committed by court, in the opinion of the movant, together with such argument, authority, and statements from the record which may, in the opinion of movant, support the motion. *Dewey v. American Nat'l Bank*, 382 S.W.2d 524, 528 (Tex. App. – Amarillo 1964, writ ref'd n.r.e.) (on motion for reh'g), cert. denied, 382 U.S. 821, 86 S.Ct. 49, 15 L.Ed.2d 67 (1965).

For the first time in this case, including all appeals, petitioner alleges in her motion for rehearing that the opinion of the court of appeals is contrary to federal laws. Petitioner is a lawyer, who is employed by the federal government (opinion, page 2). She authored her own petition for review and reply to respondent's response to that petition in this Court. She knew, or should have known, if there were any federal law questions involved

in this case, and this appeal, long before she authored and filed her motion for rehearing. No federal law questions were previously raised in this case, including the appeals, because no legitimate federal law questions exist in this case.

3. Petitioner now asks this Court in her motion for rehearing to rehear matters that were never heard by the trial court, the court of appeals, or this Court, which is wrong. Matters must have first been heard, to later be reheard.

In her motion petitioner takes her new federal law issues to even another level, requesting to amend her motion for rehearing already containing improper new matters with more additional now "found" new matters.

4. Petitioner's motion for rehearing raises sham federal law issues, solely to attempt to create jurisdiction for her further appeal of this case. Petitioner's intent in this regard has been previously demonstrated before this Court, when she contended the attorney's fees award violated the open courts provision of the Texas Constitution, when the law clearly precluded that issue, in an attempt to bootstrap the jurisdiction of this Court (see respondent's response, page 5).

WHEREFORE, PREMISES CONSIDERED, respondent requests that petitioner's motion and motion for rehearing be denied.

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of August, 1998, a true and correct copy of the above and foregoing Response In Opposition To Motion To File Amended Motion For Rehearing And To Motion For Rehearing was sent by U.S. mail, certified return receipt requested, to Dianne Richards, 5599 San Felipe, Suite 903, Houston, Texas 77057.

/s/ _____

David B. Black

RESPONDENT'S APPENDIX 2

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE GENERAL COUNSEL
CHILDREN, FAMILIES AND AGING DIVISION

October 30, 1998

Mrs. Cynthia Frey Nordstrom
9100 Sterling Montague Drive
Great Falls, Virginia 22066

Dear Ms. Nordstrom:

Your recent correspondence to the Federal Office of Child Support Enforcement (OCSE) has been referred to our office for direct reply.

It is our understanding, based on the documents submitted, that you filed an action in the court of appeals for the First District of Texas appealing a decision from the 245th District court in Harris County, Texas in which you sought unsuccessfully to modify your child support order. The court of appeals affirmed the lower court's decision and the State Supreme Court denied your petition for review and motion for a rehearing. You then submitted documents dated October 2, 1998 to OCSE and the Department of Health and Human Services (HHS) "on appeal from a Texas state court decision" requesting various forms of relief from OCSE and HHS.

The establishment of the guidelines to be used in determining or modifying a child support award amount is substantially a matter of State law. The application of these guidelines is determined by State rather than Federal law. The guidelines Texas have enacted would

appear to be in accordance with the requirements in 45 C.F.R. 302.56.

The provisions establishing the Secretary's duties and authority under the Child Support and Establishment of Paternity Program are set out in section 452 of the Social Security Act. Most of these duties or responsibilities are delegated from the Secretary to the Deputy Director/ Commission of OCSE. The provisions in section 452 do not include any authorization for the Secretary to overrule decisions issued by a State court. Accordingly, neither the Department nor OCSE has the authority to grant the relief that you requested.

We are returning the documents which you submitted to the Office of Child Support Enforcement here in Washington, D.C. where they will be available for you to pick up. Further inquiries concerning this matter should be directed to Mr. James Travis in the OCSE Regional Office at the following address:

1200 Main Tower
Suite 1700
Dallas, Texas 75202
Phone (214) 767-6239

Mr. Travis may be able to explain to you further the requirements of the Federal law and regulations or respond to your questions concerning the Texas guidelines.

/s/ Robert E. Keith
Robert E. Keith
Associate General Counsel

cc: Judge David G. Ross
James Travis, Region VI